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In the Supreme Court of the United States

OCTOBER TERM, 1957.

No. 536.

LEE OLIPHANT, *et al.*,

Petitioners,

v.

BROTHERHOOD OF LOCOMOTIVE FIREMEN AND ENGINEMEN, *et al.*,

Respondents.

BRIEF OF RESPONDENTS
In Opposition to Petition for Writ of Certiorari

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QUESTION PRESENTED.

The question presented by this action is not, we believe, correctly stated in the petition for writ of certiorari. In stating the question according to the respondents' understanding of the case, the following facts are relevant:

The 1934 amendments to the Railway Labor Act contain this provision:

> "The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act."[1]

And the term "representative" is defined as follows:

> "The term 'representative' means any *person or persons, labor union, organization,* or *corporation* designated either by a carrier or group of carriers or by its or their employees, to act for it or them." (Emphasis ours.)[2]

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[1] 45 U. S. C. Sec. 152, Fourth.

[2] 45 U. S. C. Sec. 151, Sixth.

The Congress did *not* incorporate in the Railway Labor Act a provision requiring a labor organization, if selected by the majority of a craft to be the craft representative, to accept all employees within the craft as members of the organization or otherwise restrict the prior right of such organization under the common law to prescribe its own qualifications for membership.

With this statutory background, the question presented by this action is, we believe, properly stated as follows: Did the Congress, when enacting the 1934 amendments to the Railway Labor Act, deprive Negro firemen of a right guaranteed by the Fifth Amendment when it omitted from the Act a prohibition against labor organizations prescribing membership requirements along racial lines?[1]

STATEMENT OF THE CASE.

The Charge That the Brotherhood Commits Acts of Discrimination of a Hostile Nature Affecting the Employment Rights of Negro Firemen.

Little needs to be said in answer to the charge made by the petitioners that the Brotherhood indulges in hostile discrimination against Negro firemen in connection with their employment rights.

This Court will recall that by its decisions in *Steele v. L. & N. R. R.*, 323 U. S. 192, *Tunstall v. BLF&E*, 323 U. S. 214, and *Graham v. BLF&E*, 338 U. S. 232, this Court con-

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[1] The current constitution of the Brotherhood requires that the following conditions, among others, be met by applicants for membership:

"He shall be white born, of good moral character, sober and industrious, not less than sixteen (16) years of age, and be able to read and write the English language and understand our constitution. Mexicans, or those of Spanish-Mexican extraction are not eligible."

demned as a product of hostile discrimination the Southeastern Carriers' Conference Agreement of February 18, 1941, upon the strength of the allegations contained in the Negro firemen's complaints.

Thereafter, for the first and only time, the Brotherhood and a southeastern railroad undertook to provide a Federal court, through the testimony of live witnesses in open court, with an understanding of the actual railroad operating conditions that led to the making of the Southeastern Agreement. This occurred in the case entitled *Rolax v. Atlantic Coast Line Railroad, et al.*, 91 F. Supp. 585. District Judge Hutcheson found the facts to be other than as charged by the Negro firemen in their complaint, but on appeal the Court of Appeals for the Fourth Circuit reversed the judgment below without regard for the District Court's findings but solely on the ground that the Southeastern Agreement of February 18, 1941, had already been declared invalid by the decisions of this Court in the *Tunstall*, *Steele* and *Graham* cases. (186 F. 2d 473.)

The ultimate outcome of the litigation launched by the Negro firemen had thus been made apparent to all concerned, with the result that the Brotherhood, late in 1951, entered into settlement negotiations with the Negro organizations and brought to an end the eleven suits then pending. In these settlements the Brotherhood agreed that it, its officers, agents and employees, would consent to be permanently enjoined from enforcing any agreement or any practice that discriminates in an unlawful manner against Negroes employed as locomotive firemen. (See defendants' Exhibits "G" and "H.")

These are the conditions under which the Brotherhood is now functioning as the representative of the firemen's crafts on the southeastern railroads where Negro firemen are employed.

At the trial of the instant case the petitioners' witnesses gave testimony regarding four current situations which petitioners contend constitute acts of hostile discrimination against the Negro firemen. Regarding these alleged acts of discrimination, District Judge Jones made the following finding in his opinion:

> "It is the plaintiffs' position * * * that the Brotherhood continues to exercise discrimination in its representation, particularly in (1) reducing the minimum mileage requirements for firemen, which has the effect of reducing the monthly income of the negroes; (2) applying the 'gouge' rule in such a way as to reduce earnings of the negroes; (3) applying the mileage rules to firemen and not to demoted engineers; and (4) bargaining for a compulsory retirement at age 70. For reasons which shall appear later, these alleged acts of discrimination will not be discussed in detail, but it should be noted that as to (3) above, proof was mainly in the form of opinion and was denied by Brotherhood officials, while (1), (2) and (4) are legitimate practices used by most unions for reasons other than discrimination, and since they apply to all who come within the terms of the rule involved, whether the individuals are white or colored, this court cannot state definitely that this Brotherhood adopted these practices for the purpose of discrimination against the negroes."

District Judge Jones then made these further observations regarding conditions on the southeastern railroads which are at the bottom of the Negro firemen's complaints that they are being discriminated against:

> "It should be further noted that it is clear that all the alleged unequal treatment which has resulted in years of litigation between the negro firemen and the Brotherhood was made necessary by the longstanding rule of the railroads that engineers must have three

years experience as firemen, and the further rule that negroes may not become engineers." * * *

"There can be no real assurance that membership in the defendant would prevent discrimination, since it is my opinion under the evidence here that the effective discrimination is by the railroad employer, rather than by the Brotherhood, and the railroad employers are not parties to the action."

These statements are to be deemed findings made by the District Court in keeping with the requirements of Rule 52, following five days of testimony and argument in open court.

Notwithstanding the foregoing, the petitioners would have this Court believe that the District Judge found the fact to be that the employment rights of Negro firemen are not the same as those of white firemen because of discriminatory tactics engaged in by the Brotherhood. (Petition for Writ, pages 4 and 5.) To accomplish this, petitioners quote the following statement from Judge Jones' opinion:

"There is no question that the evidence presented establishes the fact that these plaintiffs and the members of their class are discriminated against in respect of their representation and participation; their condition of employment and other matters relating to their employment."

If the District Judge intended this statement to be a finding that the *Brotherhood* is responsible for the Negro firemen having employment rights differing in any respect from the employment rights of the white firemen, these respondents simply fail to understand the memorandum opinion.

Petitioners Contend that Their Inability to Qualify for Membership in the Brotherhood Deprives Them of Valuable Privileges.

It must be assumed that the Congress knew, because of the broad definition which it gave to the term "representative" as incorporated in the Railway Labor Act, that a majority of the employees comprising a craft or class will sometimes select a person, or a committee of persons, to be their representative. More often, however, a craft or class of employees selects a labor union to be the craft representative. When a labor union is the craft representative, basic rights guaranteed by the Fifth Amendment are violated, the petitioners contend, if membership in the union is restricted along racial lines.

In attempting to demonstrate the importance to the individual employee of holding membership in the Brotherhood when it is selected to be the craft representative, the petitioners represented in their complaint that the Negro firemen are placed virtually in a state of isolation when compared with the privileges that membership brings to the firemen who are members of the Brotherhood. The complaint asserts that only members of the Brotherhood are provided with copies of the collective agreements, that the members assembled at lodge meetings decide what the Brotherhood policies and its collective bargaining objectives shall be, and that members are kept informed regarding the progress of collective bargaining objectives. The petitioners assert in their complaint that time claims and grievances are handled for members of the Brotherhood, in conferences with management and before the National Railroad Adjustment Board, whereas Negro firemen are without such services.

All of these representations are substantially incorrect, as the record clearly discloses. The facts are that printing and distributing the collective agreements are

tasks assumed by the management on almost all railroads. Every fireman is entitled to a copy of the agreement, and to receive it he has only to make a request to the proper railroad official (Tr. 390-392, 503). Between printings of the collective agreement, new agreements are customarily posted by the management on bulletin boards for all employees to read (Tr. 504).

Members of the Brotherhood do *not* determine Brotherhood policy or decide upon its collective bargaining objectives. The officers responsible for such matters arrive at their own decisions, uncontrolled by any form of direct dictation from the membership (Tr. 480). The members are not advised of collective bargaining objectives or of collective bargaining progress (Tr. 479). Collective bargaining for the purpose of establishing rates of pay, rules, and working conditions is conducted, to an increasing extent, on a national or regional scale, and the results of these efforts, together with reports on other subjects of general interest to the membership, are reported each month in detail in the Brotherhood's Magazine and also to some extent in a weekly newspaper called "Labor," published by a group of labor organizations, including the Brotherhood. The Magazine and "Labor" are available to every Negro fireman and to every other non-member fireman who desires the same, at a nominal subscription rate (Tr. 380-382, Defendants' Exhibits "M" and "N").

In respect to the handling of time claims and grievances, the Brotherhood's local chairmen and general chairmen represent Negro claimants and Brotherhood members without any distinction between them. The Negro has only to make a request for representation and submit a claim having merit for it to be handled (Tr. 296, 506-507, 560). The exhibits of record leave no room for dispute on this subject (Defendants' Exhibits "P" and "R"). It should be obvious that the Brotherhood would be defeating its own

best interests if it were to let a violation of the schedule agreement go uncorrected, regardless of whether a member or a non-member is affected by the violation.

Once in each four years members of the Brotherhood assemble in local lodge meetings to elect local lodge officers. If Negro firemen were members, they would, of course, be entitled to participate in elections at the local lodge level (Plaintiffs' Exhibit "1," pp. 128, 139, and 148).

The foregoing facts need to be understood before a court can appraise the practical importance of the right to membership which the petitioners assert is a right guaranteed them by the Fifth Amendment to the Constitution.

An indication of the extent to which non-membership in the Brotherhood has had a favorable or detrimental effect on the relative position occupied by the Negro firemen in comparison with other railway employees is disclosed by the following facts.

The Negroes are a small minority group occupying the top seniority positions in the firemen's craft on the seniority districts where they are employed. Their employment is steady, and they are virtually guaranteed employment for life by the firemen's collective agreements. The earnings of the Negro firemen average between $6,500 and $7,500 per year (Tr. 527). The responsibilities they must assume are a minimum among engine- and train-service employees inasmuch as they are not obliged to prepare for and assume the far greater responsibilities of engineers. (Defendants' Exhibits "G" and "H.") It is no exaggeration to say that probably no group of craftsmen employed in any American industry occupy more favorable employment status in terms of high pay, guaranteed employment, desirable employment conditions, and a minimum responsibility, than do the Negro firemen employed on the southeastern railroads.

ARGUMENT.

The Source of the Petitioners' Right to Become Members of the Brotherhood, If They Have Such Right, Must Be the Fifth Amendment.

The petitioners assert that Negro firemen employed on the southeastern railroads are being subjected, in connection with their employment rights, to acts of hostile discrimination by the Brotherhood. Because of this situation, the petitioners contend, they are entitled to protection from a court of equity in the form of an injunction prohibiting the officers of the Brotherhood from observing or enforcing the requirement of the Brotherhood's constitution that membership in the organization be restricted to persons of the white race.

The respondents challenge this contention, not only because the record negatives the charge of discrimination, but also because if the petitioners have a legal right to have the doors of membership opened to them, such right must exist independent of and regardless of what the facts may be with respect to the alleged discrimination. The Court's attention is invited to the following considerations.

The evidence presented to the District Court establishes beyond any possibility of serious argument that the Negro firemen's current grievances are not the result of discriminatory tactics on the part of the Brotherhood, but are merely grumblings against agreements which the Negro firemen dislike in exactly the same manner that many senior white firemen dislike and complain about them[1] (Tr. 405, 420, 555, 556).

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[1] For example, there are a total of 125 Negroes employed as firemen on the Louisville & Nashville Railroad. The L. & N. Railroad is divided into twenty seniority districts. These 125 Negroes are employed on only four seniority districts, whereas only white firemen are employed on the other sixteen seniority districts. The agreements and mileage regulations against which the Negroes complain are enforced on all of the districts comprising the L. & N. Railroad.

The senior white and Negro firemen are, by reason of their age and superior seniority, at the peak of their employment opportunities. The years of employment left to them are relatively few. They want to be free to earn all of the mileage that they are physically able to work. If they were not restrained by rigid mileage regulations, they would "hog" (Tr. 519) the available mileage at the expense of the men on the lower end of the seniority rosters, with the result that more firemen would be furloughed and walking the streets looking for work than now are.

Because the railway industry is an industry of shrinking employment, caused primarily by technological developments,[1] the Brotherhood adopted at its last convention, held in 1953, a national policy of spreading the available work in the firemen's craft among as many firemen employees as is practicable (Tr. 404).

The agreements that tend to carry out this policy are the agreements against which the Negroes are complaining. But these agreements are of general applicability and are enforced alike on all seniority districts. *The Negro firemen have as much, and as little, reason to complain about this humane policy as do the senior white firemen, and the latter's complaints are many* (Tr. 405, 420, 555, 556).

A second reason why the petitioners' charge of discrimination should have no bearing upon the success of this action is that this Court has already defined the judicial remedy available to employees when subjected to hostile discrimination by their statutory agent while act-

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[1] The peak peace-time employment in the railway industry once reached two million jobs. It is now less than one million jobs. In the past ten years, 30,000 firemen's jobs have disappeared from the railroads. (Tr. 403.) On the Louisville and Nashville Railroad alone, 600 firing jobs have been lost because of the superior power and efficiency of the Diesel locomotive over the steam locomotive. (Tr. 530.)

ing pursuant to the Railway Labor Act. The *Steele* and *Tunstall* decisions laid down this formula.

Access to this remedy has been augmented for the petitioners and those whom they represent, by the Brotherhood's submission to permanent injunctions which enjoin it from committing any form of hostile discrimination against the Negro firemen in connection with their employment rights. (Defendants' Exhibits "G" and "H.")

An additional reason, the respondents believe, why discrimination should have no bearing upon the petitioners' right of action, if a right exists, is that such cause of action must surely be founded upon some right protected by the Constitution.

The petitioners assert that they have a legal right to become members of the Brotherhood. No authority need be offered in support of the statement that the common law has always recognized the right of a voluntary association to adopt any conditions it might choose in specifying who may, or may not, become members of the association. The Brotherhood is, of course, a voluntary association.

The respondents are not aware of any attempt having been made by the Congress to change the common law in this respect. There is no language to be found in the Railway Labor Act, or, for that matter, in the National Labor Relations Act, suggesting that the Congress intended to legislate upon this subject. Indeed, the legislative history establishes beyond argument that the subject was considered by the Congress but was omitted from the Acts.

It must, therefore, follow that if the petitioners are entitled to an injunction ordering the Brotherhood to accept them into membership, it is because they are asserting some right that is protected by the Fifth Amend-

ment.[6] What this right is, the respondents do not profess to know, but if it exists it is obviously a right which the Congress should have taken account of when it enacted the Railway Labor Act, but neglected to do so. And it would seem that the enforcement of this right would *not* turn upon the question whether in a particular instance a labor union has been faithful or unfaithful in its representation of a craft or group of employees while discharging its collective bargaining duties.

The Adoption and Enforcement of the Brotherhood Law Limiting Applicants for Membership to Persons of the White Race Was, and Is, Consistent With the Known Law.

The date and the circumstances under which the members of the Brotherhood acted to restrict the membership of the Brotherhood to persons of the white race, are not without significance when weighing the question whether this law of the organization violates a legal right of the Negro firemen that is protected by the guarantees of the Fifth Amendment. We believe, for example, that the legal problem posed by the instant action is not the

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[6] Petitioners assert (page 9 of petition) that the Brotherhood is "a federally-certified labor union exercising federally-created bargaining power over excluded Negro employees."

For whatever bearing this circumstance may have on the instant action, the record contains no evidence to justify the statement that the Brotherhood has been certified by the National Mediation Board to be the representative of the firemen's craft on any of the southeastern carriers. Neither is it correct, in any practical sense, to say that the Brotherhood is exercising a "federally-created bargaining power" on these railroads. The record discloses that the Brotherhood negotiated its first collective agreements on behalf of the firemen's crafts on the Louisville & Nashville Railroad and on the Central of Georgia Railroad in 1919, and that these agreements have continued in effect down to the present time, though augmented from time to time by supplemental agreements containing additional employment rules and working conditions. (Tr. 514, 547.)

same problem that would be posed if the members of the Brotherhood, assembled in convention, had only yesterday resolved to exclude from membership all persons that are not members of the white race.

The law of the Brotherhood which limits its membership to persons of the white race was adopted by a convention of the Brotherhood as far back as the year 1881.[7] The Brotherhood is not just a labor union. It is organized as, and performs the normal functions of, a fraternal benefit society (Tr. 374). The Brotherhood also has an auxiliary organization known as the "Ladies Society of the Brotherhood of Locomotive Firemen and Enginemen." The members of the Ladies Society are the wives, mothers, daughters and sisters of the Brotherhood members. The membership of the Ladies Society numbers approximately 45,000 persons. The Brotherhood's lodges and the lodges of the Ladies Society frequently hold joint meetings and engage in concerted activities (Tr. 374, 449-450).

We assume that no one, not even the petitioners, would assert that this rule restricting the membership of the Brotherhood to persons of the white race was an unlawful condition when it was adopted by the Brotherhood convention about 1881. It, furthermore, seems certain that this qualification for membership did not conflict with any law at the time that the first Railway Labor Act was adopted in 1926.

As previously stated, there is no language to be found in the provisions of the Railway Labor Act as now in effect, or in any other statute enacted by the Congress, that either specifically affirms, or impliedly compels the conclusion, that organizations such as the railway brother-

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[7] The Brotherhood was organized December 1, 1873 (Tr. 372, 431). See Defendants' Exhibit "I."

hoods may not lawfully enforce restrictions on membership based upon racial differences.

If the Federal Constitution condemns this restriction on membership, it is not possible for the Brotherhood's legal counsel to know of this fact in advance of a decision by this Court, because this question has no apparent precedent among the decisions of this Court. In the meantime, or until a forthcoming convention of the Brotherhood repeals the requirement that applicants for membership must be of the white race, those responsible for the management of the Brotherhood are obliged by the common law of voluntary associations to enforce the laws of the organization according to their tenor and regardless of what may be their personal attitude toward any particular law.

There Is Insufficient Reason for By-Passing the Court of Appeals.

The explanation offered by petitioners for attempting to by-pass the Court of Appeals, Sixth Circuit, and come directly to this Court was to have the issues raised by the case of *Conley v. Gibson* (No. 7, October Term, 1957) and the instant case heard and determined at the same time.

Since this Court did not see fit to delay the argument in *Conley v. Gibson* as was requested by petitioners, it would appear that such justification as there might have been for by-passing the Court of Appeals no longer exists.

The Decision Below Is Not in Conflict With Any Applicable Decision of This Court.

The petitioners argue that since the District Court found that the Brotherhood engages in discriminatory practices affecting the petitioners' employment rights, the decision of the District Court refusing to order the Brotherhood to accept Negro firemen into membership is con-

trary to the decisions of this Court in the *Steele, Tunstall, Graham, Howard* and *Syres* cases (p. 7, Petition).

We pointed out in "Statement of the Case," *supra*, the reason why we believe the petitioners are clearly in error in stating that the District Court found that the Brotherhood is engaging in discriminatory tactics affecting the Negro firemen's employment rights. The only discriminatory action of which the Brotherhood is chargeable is the enforcement of its ancient rule limiting its membership to persons of the white race, and the consequent effect this has of preventing Negro firemen from participating in local lodge elections for local lodge officers held once each four years.

The lawfulness or unlawfulness of this alleged discrimination is the question that the instant action is supposed to answer, and the decisions in *Steele* and *Tunstall* and the other cases cited by the petitioners do not, insofar as the respondents understand them, have any direct bearing upon the extraordinary relief sought by the petitioners in the instant action.

As a matter of fact, it would seem that the doctrine of fair representation for all members of a craft, as laid down by the decisions in the *Steele* and *Tunstall* cases, was predicated in considerable part upon the unquestioned premise that the Railway Labor Act does *not* alter the right of railway labor organizations to prescribe as they see fit the conditions governing admittance to membership, as they have always done. We believe this is what Mr. Chief Justice Stone had in mind when he said:

> "So long as a labor union assumes to act as the statutory representative of a craft, it cannot rightly refuse to perform the duty, which is inseparable from the power of representation conferred upon it, to represent the entire membership of the craft. *While*

the statute does not deny to such a bargaining labor organization the right to determine eligibility to its membership, it does require the union, in collective bargaining and in making contracts with the carrier, to represent non-union or minority union members of the craft without hostile discrimination, fairly, impartially, and in good faith." (323 U. S. 192, at 204.) (Emphasis ours.)

The Prayer for "Integration" in Labor Unions Should Be Addressed to Congress.

The third portion of petitioners' argument concerning the reasons why their petition should be granted appears to be centered about the contention that "integration in the field of labor would advance public acceptance of integration in other areas of community life" (p. 9, Petition).

No matter how wise and desirable total integration of the races in all phases of the national life may prove in time to be, it seems to the respondents that integration in certain phases of the national life, including "the field of labor," calls for the exercise of the legislative powers of the Government before the powers of the judicial branch may properly be invoked.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari does not fulfill those conditions specified in Rule 19 of this Court which would justify the granting of a writ.

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